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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/769,245	01/26/2001	Jeffrey Ray Stout	BO 44277	5103

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EXAMINER

CHOI, FRANK I

ART UNIT	PAPER NUMBER
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1616

DATE MAILED: 07/02/2003

12

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Applicati n N .

09/769,245

Applicant(s)

STOUT ET AL.

Examiner

Frank I Choi

Art Unit

1616

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on 14 April 2003.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-26 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-26 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____
- 4) ☐ Interview Summary (PTO-413) Paper No(s). _____
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____

DETAILED ACTION

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-26 are rejected under 35 U.S.C. 103(a) as being unpatentable over Simone (US Pat 5,397,786) in view of Weinstein et al. (U.S. Pat. 6,013,290), WO 96/04240, Fang (U.S. Pat. 5, 886,040), Webster's Dictionary (10th Ed.), Odian et al. (Schaum's Outline), Hultman et al. (U.S. Pat. 5,767,159) and St. Cyr et al. (U.S. Pat. 6,159,942) for the reasons of record set forth in the prior Office Action in further view of Krotzer et al. (US Pat. App. Pub. 2001/0008641) and the further reasons below.

Simone, Weinstein et al., WO 96/04240, Fang, Webster's Dictionary (10th Ed.), Odian et al., Hultman et al. and St. Cyr et al. were discussed in the prior Office Action and the same are incorporated herein.

Krotzer et al. teaches the use of creatine and phosphorus for body building in which the daily intake amount may be obtained by a single serving or by multiple serving, and that the most preferred serving for phosphorus is 2,690 mg (Paragraphs 0041-0042).

Examiner has duly considered Applicant's arguments but deems them unpersuasive.

In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re*

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Merck & Co., 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). Further, the test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference; nor is it that the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981).

Applicant argues that one of ordinary skill in the art would immediately conclude that the amounts suggested by Krotzer et al. cannot have referred to the amount of individual elements because of toxicity issues. However, Krotzer specifically indicates that the amounts in table A are the preferred concentrations (paragraph 0041). Further, disclosed examples and preferred embodiments do not constitute a teaching away from a broader disclosure or nonpreferred embodiments. *In re Susi*, 169 USPQ 423 (CCPA 1971). “A known or obvious composition does not become patentable simply because it has been described as somewhat inferior to some other product for the same use.” *In re Gurley*, 554, 31 USPQ2d 1130, 1132 (Fed. Cir. 1994).

Applicant argues that there is no motivation to combine the references, however, the prior art teaches that carbohydrates, buffers and phosphorus are necessary supplements for persons who are exercising to replenish energy stores and counteract increased blood acidity (See Weinstein et al., Column 4, lines 30-68, column 5, lines 50-58, Column 6, lines 7-14, 20-24). Applicant argues that one of ordinary skill in the art would not be motivated to add the claimed amount of phosphorus. However, as suggested by Krotzer et al., amounts falling within the scope of the claimed amounts are preferred for purposes of bodybuilding.

In response to applicant's argument that the prior art are nonanalogous art, it has been held that a prior art reference must either be in the field of applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the applicant was concerned, in order to be relied upon as a basis for rejection of the claimed invention. See *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992). In this case, All the references are in the field of applicant's endeavor or reasonably pertinent to the particular problem with which Applicant was concerned, i.e. nutritional supplements containing phosphorus and creatine..

In response to applicant's argument that it has different reasons for combining creatine, phosphorus and blood buffer, the fact that applicant has recognized another advantage which would flow naturally from following the suggestion of the prior art cannot be the basis for patentability when the differences would otherwise be obvious. See *Ex parte Obiaya*, 227 USPQ 58, 60 (Bd. Pat. App. & Inter. 1985). Applicant did recognize another advantage, i.e. as explained in the Amendment at pages 16, 17. Further, Krotzer et al. does teach and suggest the use of creatine and phosphorus and the benefits of each in body building.

Applicant argues that the ratio is not specifically disclosed by the prior art. However, Applicant has not shown that the ratio is critical and the ratio broadly encompasses 1:25 to 10:1. Further, the prior art does teach the combination of creatine, at least 75% of RDA of phosphorus and blood buffers. Examiner notes notwithstanding how the limitation is worded at least 75% of RDA is or range of amounts and the prior art teaches amounts falling within said range, as such, the claim limitation is met. Applicant's arguments regarding St. Cyr et al. do not overcome the rejection as the other prior art clearly shows how to make and use creatine and phosphorus supplements.

Applicant argues that it has shown synergistic and unexpected effects. However, the examples in the Specification related to specific formulations containing specific amounts of the specified compounds whereas the claims are far broader in scope. As such, said examples do not appear commensurate in scope with the claimed subject matter. Further, the examples in the Specification appear to show an additive as opposed to a synergistic effect and, in any case, cannot show synergism as there is no data for power output for the combination of creatine and phosphate or creatine/phosphate/blood buffer and no data for AWC for creatine, phosphate or creatine/phosphate. Applicant argues that the references cited are silent on improvements of anaerobic working capacity, however, the prior art teaches that creatine and phosphate are used in an anerobic process to replenish ATP which is the cellular source of energy (See St. Cyr et al., column 1, lines 29-43, 60-64). As such, one of ordinary skill in the art would expect that anerobic work capacity would be increased.

Applicant's now argue for the separate patentability of claims 4,5,6,7,8,15,17, however, creatine salts, hydrosoluble creatine, organic creatine salt, creatine citrate salts, carbohydrates, pentose and sodium salts are suggested by the prior art (See Office Action (7/3/2002).

Therefore, the claimed invention, as a whole, would have been *prima facie* obvious to one of ordinary skill in the art at the time the invention was made, because every element of the invention has been collectively taught by the combined teachings of the references.

Conclusion

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period

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will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.


A facsimile center has been established in Technology Center 1600. The hours of operation are Monday through Friday, 8:45 AM to 4:45 PM. The telecopier numbers for accessing the facsimile machines are (703) 308-4556 or (703) 305-3592.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Frank Choi whose telephone number is (703) 308-0067. Examiner maintains a flexible schedule. However, Examiner may generally be reached Monday-Friday, 8:00 am – 5:30 pm (EST), except the first Friday of the each biweek which is Examiner's normally scheduled day off.

If attempts to reach the Examiner by telephone are unsuccessful, the Examiner's Supervisor, Mr. Thurman Page, can be reached on (703) 308-2927. Additionally, Technology Center 1600's Receptionist and Customer Service can be reached at (703) 308-1235 and (703) 308-0198, respectively.

FIC

June 30, 2003



JOHN PAK
PRIMARY EXAMINER
GROUP 1600